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IN THE

Supreme Court of the United States

AIR LINE PILOTS ASSOCIATION, INTERNATIONAL, *et al.*,
Petitioners,

v.

DELTA AIR LINES, INC.,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals For the Eleventh Circuit

REPLY OF PETITIONERS AIR LINE PILOTS ASSOCIATION, INTERNATIONAL, *ET AL.*,

MARCUS C. MIGLIORE
Legal Department
AIR LINE PILOTS ASSOCIATION, INTERNATIONAL
1625 Massachusetts Ave, N.W.
Washington, D.C. 20036
(202) 797-4054

MICHAEL E. ABRAM
Counsel of Record
MICHAEL L. WINSTON
PETER D. DECHIARA
COHEN, WEISS AND SIMON LLP
330 West 42nd Street
New York, N.Y. 10036
(212) 563-4100

Attorneys for Petitioners Air Line Pilots Ass'n, Int'l ("ALPA"), the Delta Master Executive Council of ALPA, Charles Giambusso, Mark Moore, and James Icenhour

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Petitioners Air Line Pilots Association, *et al.* ("ALPA") respectfully submit this reply to the Brief In Opposition ("Br. Opp.") of Respondent Delta Air Lines, Inc. ("Delta").

I. THE ELEVENTH CIRCUIT SPLIT FROM OTHER CIRCUITS IN HOLDING THAT A UNION HAS AN AFFIRMATIVE OBLIGATION TO END UNAUTHORIZED, UNRATIFIED EMPLOYEE CONDUCT

Under the Norris-LaGuardia Act ("NLGA"), a union cannot be enjoined absent clear proof of its having authorized, participated in or ratified unlawful employee conduct. *See* 29 U.S.C. § 107(a) (court may only enjoin union for engaging in unlawful conduct or "actually authorizing or ratifying" it); *id.* § 106 (to hold union responsible or liable for acts of members requires "clear proof" of union's actual authorization, participation or ratification). The district court below found that ALPA did not ratify the pilot no-overtime campaign, *see* App. 30a, 40a, and the court of appeals did not disturb this finding, *see* App. 18a. Nonetheless, the appeals court found that simply avoiding ratification under the NLGA standard was not enough: "The duty of ALPA under the [Railway Labor Act ("RLA")] is sufficiently high that *even if it has not sponsored or ratified* the unlawful job action by the pilots, it has a *duty to end* such unlawful action." App. 19a n.22 (emphasis added). Indeed, even though the RLA requires only a "reasonable effort" by unions to make and maintain agreements, 45 U.S.C. § 152 First, the court of appeals held that ALPA "is statutorily bound to do *everything possible* to maintain' the [collective bargaining agreement] so that commerce is not in any way interrupted." App. 18a (emphasis added).

After the court of appeals decision issued in this case, the Seventh Circuit, in a March 14, 2001 decision, split from the Eleventh Circuit, expressly applying the NLGA authorization or ratification standard to determine whether a union can be

enjoined under the RLA for an unlawful employee job action. *See United Air Lines, Inc. v. International Ass'n of Machinists & Aerospace Workers*, 166 L.R.R.M. (BNA) 2769, 2779-80 (7th Cir. 2001) (applying NLGA §§ 6, 7(a)). The Seventh Circuit relied, *see id.* at 2779, on its earlier decision in *Air Line Pilots Association v. United Air Lines, Inc.*, 802 F.2d 886, 905 (7th Cir. 1986), which held that a union can not be liable for violation of the RLA based on an employee "sick out" unless the carrier satisfies the NLGA § 6 standard by showing clear proof of the union's involvement. The Seventh Circuit has thus joined the Tenth Circuit in holding that the NLGA authorization-or-ratification standard sets the outer limits of a union's obligations in the face of unlawful employee conduct. *See Fry v. Airline Pilots Ass'n Int'l*, 88 F.3d 831, 842 (10th Cir. 1996) (NLGA standards "establish a congressionally mandated restrictive test of union responsibility for unlawful acts").[1]

Cases from the Third and Sixth Circuits, too, hold, in opposition to the Eleventh Circuit decision here, that a union cannot be held responsible for unlawful job actions that it did not sponsor or ratify. *See Philadelphia Marine Trade Ass'n v. Local 1291, Int'l Longshoremen's Ass'n*, 909 F.2d 754, 758-59 (3d Cir. 1990) (holding, based on NLGA requirements, union may not be enjoined for wildcat strike it did not ratify); *United Steelworkers v. Lorain*, 616 F.2d 919, 921-24 (6th Cir. 1980) (applying NLGA standard to hold union not liable for strike it

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[1] Delta cites *Fry* for the proposition that a union can be held responsible for failing, in the face of unlawful employee conduct, to take "affirmative remedial action." Br. Opp. at 10 n.8 (quoting *Fry*'s discussion, 88 F.3d at 842, of *Yellow Bus Lines, Inc. v. Local Union 639*, 883 F.2d 132, 136 (D.C. Cir. 1989)). ALPA does not dispute that the ratification standard of the NLGA may, in appropriate circumstances, require affirmative action by the union. *See Yellow Bus Lines*, 883 F.2d at 136; *Prater v. UMW*, 793 F.2d 1201, 1210 (11th Cir. 1986); *U.S. Steel Corp. v. UMW*, 598 F.2d 363, 365 (5th Cir. 1979). The court of appeals in this case, however, imposed a duty on ALPA *beyond* the ratification standard, requiring it to end the employee conduct. App. 19a n.22.

did not ratify). Delta argues these cases are inapt because they arise under the National Labor Relations Act ("NLRA"), 29 U.S.C. §§ 151 *et seq.*, a statute which, Delta asserts, imposes on a union no duty to prevent interruptions to commerce. *See* Br. Opp. at 11. On the contrary, the NLRA, which aims to "safeguard[ ] commerce from injury, impairment, or interruption," 29 U.S.C. § 151a, more strictly confines a union's use of economic weapons than does the RLA.[2] Under the NLRA, when, as in *Philadelphia Marine*, 909 F.2d at 756-57, and *Lorain*, 616 F.2d at 920, a union is party to a collective bargaining agreement containing a no-strike clause, it has an affirmative duty to refrain from striking and a violation of that duty may, under appropriate circumstances, be enjoined. *See Boys Market, Inc. v. Retail Clerks Union, Local 770*, 398 U.S. 235 (1970). Thus, the issue in both *Philadelphia Marine* and *Lorain* was the same issue in the instant case: the extent of the union's affirmative duty if employees engage in an unauthorized illegal job action. The Third and Sixth Circuits held that the union has responsibility only to take such steps as necessary, under the NLGA standard, to avoid ratifying the job action, while the Eleventh Circuit in this case expressly held that the union's obligation extends further, having a duty not only to do *everything possible*, but a duty *to end* the job action. *See* App. 18a, 19a n.22. Nothing in the RLA or any prior caselaw supports this Eleventh Circuit determination.

Delta also argues that no conflict exists between the Eleventh Circuit decision and cases from other circuits because the instant

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[2] As the Court has explained, the RLA "provide[s] greater avenues of self-help ... than would be available under the NLRA, " *Trans World Airlines v. Independent Fed'n of Flight Attendants*, 489 U.S. 426, 439 (1989), including secondary picketing, *see Burlington Northern R.R. v. Brotherhood of Maintenance of Way Employes*, 481 U.S. 429 (1987), and intermittent strikes, *see Pan Am World Airways v. IBT*, 894 F.2d 36 (2d Cir. 1990); *see also CSX Transp. v. Marquar*, 980 F.2d 359 (6th Cir. 1992) (unlike NLRA, RLA provides no damages remedy for unlawful strike).

case only involves a preliminary injunction, not damages. *See* Br. Opp. at 9-10. But the Seventh Circuit's *United Air Lines* case, 166 L.R.R.M. at 2770, and the Third Circuit's *Philadelphia Marine* case, 909 F.2d 755, were also limited to requests for a preliminary injunction. Moreover, the NLGA standard applies in injunction as well as damages proceedings. *See* 29 U.S.C. § 107(a); *United Air Lines*, 166 L.R.R.M. at 2779-80. Regardless of the remedy sought, the issue is the same: whether a union's obligation in the face of a wildcat job action is to end it, by doing everything possible, as the Eleventh Circuit held, or to take such appropriate steps so as not to ratify the employees' action, as every other circuit ruling on the issue has held.[3]

Delta posits a meaningless distinction by arguing that the issue is not whether ALPA can be held to answer for the employees' conduct but is rather the extent of the union's *own*

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[3] Delta cites cases in which it claims a union has been enjoined under the RLA without any basis for a finding that the union instigated the job action. *See* Br. Opp. 4 n.4. Delta mischaracterizes these cases. In three of the cited cases, all or virtually all of the union members struck or otherwise engaged in a job action. *See American Airlines, Inc. v. Transport Workers Union*, 45 F.R.D. 1, 2 (N.D. Okla. 1968) ("Nearly all of the members of the Defendant local union walked off their jobs . . . . "); *Railway Agency Express, Inc. v. Empire City Lodge 2035*, 264 F. Supp. 241, 243 (S.D.N.Y. 1967) ("all but a handful of the 1,300 odd drivers" failed to report for work); *Long Island R.R. v. System Fed'n No. 156*, 289 F. Supp. 119, 125 (E.D.N.Y. 1968) ("refusal of *all* members of the union to perform any *overtime* work") (emphasis added). Such mass action creates a basis for finding union culpability. *See Eazor Express, Inc. v. International Brotherhood of Teamsters*, 520 F.2d 951, 963 (3d Cir. 1975) ("mass action by union members must realistically be regarded as union action"); *cf.* App. 36a (finding only "some" Delta pilots involved in no-overtime campaign). In the fourth case, the issue was not whether a union could be held responsible for employee conduct but whether a parent union could be held responsible for the conduct of its local union, an issue, the court noted, not governed by the NLGA. *REA Express v. Brotherhood of Ry., Airline & S.S. Clerks*, 74 L.R.R.M. (BNA) 2436, 2439-40 (E.D.N.Y. 1970).

duty under the RLA. *See* Br. Opp. at 8. If, as the court of appeals held, ALPA has a duty to end an employee job action, and then, as here, is enjoined for failing to fulfill that duty, the effect is that ALPA is being made to answer for the continuance of the unauthorized employees' conduct.

Because the Eleventh Circuit decision is at odds with other circuits on an issue of pressing national importance to labor relations in the transportation industry, the petition should be granted.[4]

II. THE ELEVENTH CIRCUIT SPLIT FROM OTHER CIRCUITS IN DISREGARDING THE LIVE TESTIMONY REQUIREMENT SET OUT IN THE PLAIN LANGUAGE OF THE NLGA

Delta does not and cannot dispute that the plain language of NLGA Section 7 sets forth a *jurisdictional* requirement that a federal court only issue an injunction in a labor dispute "after hearing the testimony of witnesses in open court (with opportunity for cross-examination)." 29 U.S.C. § 107. Nor can Delta dispute that, unlike the Eleventh Circuit in this case, other circuits have upheld the plain meaning of the statute. *See United Tel. Workers v. Western Union Corp.*, 771 F.2d 699, 703 (3d Cir. 1985); *In re District No. 1—Pacific Coast Dist. Marine Eng'rs Beneficial Ass'n*, 723 F.2d 70, 77 (D.C. Cir. 1983); *UAW v. LaSalle Mach. Tool, Inc.*, 696 F.2d 452, 456-57 (6th Cir. 1982).

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[4] Delta argues that ALPA is actually only challenging the court of appeals' "fail[ure] to credit all Petitioners claim to have done in their asserted attempt to dissuade ALPA members from the overtime ban." *See* Br. Opp. at 11. ALPA makes no such challenge. Indeed, the appeals court left undisturbed the district court's finding that ALPA did not ratify the job action. The petition, rather, seeks review of the legal determination of the appeals court, which radically expands the scope of a union's duty beyond the NLGA ratification standard to a standard that virtually imposes strict liability on the union for unauthorized, unratified employee conduct.

In defending the Eleventh Circuit's decision, Delta argues that live testimony is not required when a case presents no dispute of fact. Br. Opp. 12. The instant case, however, did present a central factual issue. The district court hearing addressed only the issue of "whether ALPA actively sponsored or ratified the pilots' no-overtime campaign, " App. 21a, but in reversing, the Eleventh Circuit changed the applicable legal standard. Ruling that ALPA had an affirmative obligation that extended beyond avoiding ratification under the NLGA, App. 19a n.22, the court of appeals created a factual issue, not addressed in the district court, as to whether "ALPA has in fact done all that it can do," App. 18a, to end the pilot job action. What further steps ALPA could have taken effectively to increase the amount of *voluntary* pilot overtime flying is a disputed, fact-bound question that, under the NLGA, should have been resolved by a hearing with live testimony prior to the issuance of an injunction against ALPA.

Delta claims that the appeals court did not require ALPA to end the job action but only that ALPA had an obligation to make reasonable efforts to try to end it. Br. Opp. at 15. Even if true, live testimony was still required; what is reasonable depends on the factual circumstances of the case. *See Monterey v. Del Monte Dunes*, 526 U.S. 687, 721 (1999) (question of reasonableness essentially fact-bound).

Delta claims too that ALPA never sought live evidence in the district court on the issue of the reasonableness of its efforts to end the job action. Br. Opp. at 15. This issue, however, arose only at the end of the lower court hearing and was dealt with by the lower court through post-hearing briefs, without providing an opportunity for the presentation of live testimony or cross-examination.

In any event, even in a case that appears to present no disputed facts, the plain language of the NLGA allows no exception to the live testimony rule. The statute provides that in "*any* case involving or growing out of a labor dispute" the court

only has jurisdiction to issue an injunction after hearing "the testimony of witnesses in open court (with opportunity for cross-examination). " *See* 29 U.S.C. § 107 (emphasis added). A court has no authority to expand its jurisdiction by crafting a exception to this statutory mandate.

In support of such an exception, Delta cites cases that are distinguishable from the instant one. *See Local Lodge No. 1266 v. Panoramic Corp.*, 668 F.2d 276, 290 (7th Cir. 1981) (no live testimony because "time was of the essence"); *Railway Express Agency, Inc. v. Brotherhood of Ry., Airline & S.S. Clerks*, 437 F.2d 388, 395 (5th Cir. 1971) (union waived oral testimony). But even if the cases Delta cites could be construed to create an exception to the live testimony rule when there are no disputes of fact, other circuits have remained faithful to the statutory language and not adopted such an exception. *See, e.g., United Tel. Workers*, 771 F.2d at 705; *Marine Engineers'*, 723 F.2d at 77 ("We cannot countenance any deviation from the Act"). The result is a split in the circuits on a significant matter of statutory interpretation that should be resolved by this Court.[5]

CONCLUSION

For the foregoing reasons, a writ of certiorari should be granted.

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[5] Delta argues that because the petition only concerns the preliminary injunction, and the underlying litigation may continue, certiorari should be denied, as granting it could lead to piecemeal review by the Court. Br. Opp. 12 n.13. The issue presented, however, is ripe for review and there is no reason to expect that further litigation of the case will raise any other issues warranting Supreme Court review. Moreover, having taken an interlocutory appeal from the district court' s denial of its preliminary injunction motion, Delta should not be heard to object to this Court reviewing the same interlocutory matter.

Respectfully submitted,

MARCUS C. MIGLIORE
Legal Department
AIR LINE PILOTS ASSOCIATION, INTERNATIONAL
1625 Massachusetts Ave, N.W.
Washington, D.C. 20036
(202) 797-4054

MICHAEL E. ABRAM
Counsel of Record
MICHAEL L. WINSTON
PETER D. DeCHIARA
COHEN, WEISS AND SIMON LLP
330 West 42nd Street
New York, N. Y. 10036
(212) 563-4100

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